International Seabed Authority ISBA/24/FC/4

Finance Committee

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Rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area pursuant to section 9, paragraph 7 (f), of the annex to the 1994 Agreement

Rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area

Report of the Secretary-General

I. Introduction

1. During the twenty-third session, the Finance Committee discussed the impact that the preparation of draft regulations on the exploitation of mineral resources in the Area might have on its work plan. The Committee identified several areas that required its input, including the formulation of rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area, and it requested that the Secretary-General prepare background information on that matter for preliminary consideration at the twenty-fourth session.

2. The present report has been prepared to assist the Finance Committee in its consideration of that question. The report identifies a number of key elements requiring interpretation and elaboration and contains suggestions as to how the Committee might conduct the development of rules, regulations and procedures in parallel with the development by the Legal and Technical Commission of the regulations on the exploitation of mineral resources in the Area.

II. Applicable legal provisions

3. Provisions concerning the equitable sharing of benefits from activities in the Area are found in articles 140 (2), 155 (1) (f), 160 (2) (f) (i) and (g), and 162 (2) (o) (i) of the United Nations Convention on the Law of the Sea. Provisions concerning the equitable sharing of payments and contributions derived from the exploitation of resources on the continental shelf beyond 200 nautical miles are contained in articles 82 (4), 160 (2) (f) (i) and 162 (2) (o) (i) of the Convention and in section 9,

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paragraph (7) (f), of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement).

4. Article 140 of the Convention, which belongs to section 2 (Principles governing the Area) of part XI, reads as follows:

> *Benefit of mankind*
>
> 1. Activities in the Area shall, as specifically provided for in [part XI], be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or landlocked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.
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> 2. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2 (f) (i).

5. Article 140 derives from the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction of 1970 (General Assembly resolution 2749 (XXV)). The two paragraphs in that article elaborate on the principle of the common heritage of mankind. Activities in the Area must be carried out for the benefit of mankind as a whole, and the International Seabed Authority is to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area. Neither paragraph is self-executing, and the mechanisms for their implementation differ. The Convention provides little guidance on how article 140 may be implemented, leaving it to the Assembly to adopt rules, regulations and procedures, as explained below.

6. The reason for the cross-reference to article 160, paragraph 2 (f) (i), is to identify the organs of the Authority that are entrusted with functions in relation to the implementation of article 140. Article 160, paragraph 2 (f) (i), provides that the powers and functions of the Assembly include the consideration and approval, upon the recommendation of the Council, of the rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82, taking into particular consideration the interests and needs of developing States and peoples that have not attained full independence or other self-governing status. If the Assembly does not approve the recommendations of the Council, it is to return them to the Council for reconsideration in the light of the views expressed by the Assembly. The 1994 Agreement also provides that decisions of the Assembly and the Council are to take into account recommendations of the Finance Committee on the issue of the rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the decisions to be made thereon (annex, sect. 9, para. 7 (f)). The present matter is therefore within the mandate of the Committee.

III. Previous work of the Authority and available literature related to the development of equitable sharing criteria

7. Work on the implementation of article 82 of the Convention has already begun, but the present report is the first step in describing the process towards the implementation of article 140.

8. The limited existing literature concerning the issues arising under article 140 includes a report of the Secretary-General of the United Nations on the possible methods and criteria for the sharing by the international community of proceeds and other benefits derived from the exploitation of the resources of the Area beyond the limits of national jurisdiction (A/AC.138/38 and A/AC.138/38/Corr.1). The report was issued in 1971 for the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction. It addressed the development of equitable sharing criteria and was aimed at providing the basis for a conceptual approach. It included the following list of non-financial benefits: expansion of world mineral resources, orderly development of resources, protection of the marine environment, enlarging the number of nationals with seabed technical competence, increasing the knowledge of the marine environment and seabed area, stability of raw material markets and preferential access to raw material for less developed countries. Financial benefits, on the other hand, were found to consist of the balance remaining after deduction of the expenditure from the revenues of the international machinery (personnel, supplies, training, research, etc.).

9. The report also contained a list of alternative criteria for the distribution of benefits, which were classified into two categories: direct distribution to Governments; and allocation to programmes of particular interest to developing countries. According to the report, before net proceeds reached a sufficiently large volume, direct distribution to all Governments might lead to a fragmentation of financial resources, which would result in benefits of modest significance to the receiving countries. During that initial period, there might be some advantages to concentrate available proceeds in programmes of high priority, such as the promotion of development in least developed countries (A/AC.138/38, para. 47).

10. The work of the Authority towards the implementation of article 82 of the Convention is more advanced. Since 2009, the Authority has convened a seminar and a workshop to explore important related legal and technical issues.[1] One of the issues addressed at those events was the development of equitable sharing criteria. The published outcomes of the events may assist the Finance Committee in considering the development of such criteria pursuant to article 140, given that articles 82 and 140 present some similarities (see below).

IV. Issues to be addressed for the development of equitable sharing criteria

11. The first issue to address is to gain a clear understanding of which financial benefits will be shared. Until the Authority gets sufficient funds from other sources (that is, from activities in the Area or from voluntary contributions) to meet its

[1] The Authority has published the outcomes of those events in three technical studies: *Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No. 4; *Non-Living Resources of the Continental Shelf beyond 200 Nautical Miles: Speculations on the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study: No. 5; and *Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No. 12.

administrative expenses, those expenses will continue to be met through the assessed contributions of the members of the Authority, in accordance with the Convention (arts. 171, para. (a), and 173) and the 1994 Agreement (annex, sect. 1, para. 14). Once funds are received from exploitation activities, the administrative expenses of the Authority will continue to be a first call upon the funds of the Authority, in compliance with article 173 of the Convention and regulation 5.7 of the Financial Regulations of the Authority. Article 173 and regulation 5.7 also provide that the funds that remain after payment of administrative expenses may, inter alia:

(a) Be shared in accordance with article 140 and 160, paragraph 2 (g), of the Convention;

(b) Be used to provide the Enterprise with funds in accordance with article 170, paragraph 4, of the Convention;

(c) Be set aside for the purposes of the economic assistance fund referred to in paragraph 1 (a) of section 7 of the annex to the Agreement.

12. Pursuant to paragraph 2 of article 173 of the Convention, the Authority may not use the assessed contributions for any of the purposes set out in paragraph 11 (a–c) above, even in the case of a surplus in the administrative budget.

13. A second core issue to address relates to the concept of equity. Article 140 provides that the benefits must be shared equitably, but does not define the term "equitable". Apart from part XI, the word "equitable" is used in several articles in the Convention, including in relation to the rights of landlocked and disadvantaged States to participate in the exploitation of the living resources of the exclusive economic zone of coastal States, in the composition of institutions established by the Convention and in maritime delimitations and, under article 82, in relation to criteria for the distribution of payments and contributions to States parties.

14. In compliance with paragraph 4 of article 82, payments and contributions are made through the Authority, which is required to distribute them to States parties to the Convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the landlocked among them. While articles 82 and 140 require the development of benefit-sharing criteria, there are differences in terms of the beneficiaries, the role of the Authority and the determination of the amount available for distribution. Under article 82, payments are distributed through the Authority (possibly subject to an administrative overhead charge), which has an instrumental role only, no amount may go to the economic assistance fund (see the 1994 Agreement, annex, sect. 7) and the beneficiaries are States parties to the Convention, taking into account the interests and needs of developing States, particularly the least developed and the landlocked among them. Equitable sharing criteria to be developed in relation to activities in the Area for the benefit of mankind, on the other hand, must be non-discriminatory[2] but must take into particular consideration the interests and needs of developing States and peoples that have not attained full independence or other self-governing status (art. 160 (2) (f) (i) of the Convention).[3] Interpreting how interests and needs will be

[2] Article 141 adds support to this principle by stipulating that the Area is open to use by all States without discrimination. In effect, equal access and the equitable sharing of benefits are two aspects of the same question. Furthermore, article 152 provides in clear terms that the Authority is to avoid discrimination in the exercise of its powers and functions. The granting of special consideration for developing States, including particular consideration for the landlocked and geographically disadvantaged among them, is permitted and is not considered discriminatory. The principle of non-discrimination also applies to the treatment of applicants and contractors.

[3] Article 140, paragraph 1, elaborates on the self-governing status by specifying that it is that recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.

taken into consideration is an issue. Furthermore, as a result of the differences in beneficiaries in articles 82 and 140, it is likely that consistent equitable sharing criteria will need to be developed, albeit with necessary variations or scales.

15. Given the particular consideration to be factored in the implementation, there may be a need to rank potential beneficiary States and peoples. In that regard, the question of whether the Authority will use existing indices maintained by international organizations, such as the United Nations Development Programme and the World Bank, or develop its own composite index with reference to the objects and purposes of article 140 remains to be addressed. The same issue also needs to be addressed to rank the beneficiaries under article 82 with reference to the objects and purposes of that article. Furthermore, given the difference in beneficiaries in articles 82 and 140 highlighted above, the indices may differ as well.

16. Last in this overview of issues to be addressed for the implementation of article 140 is the appropriate mechanism through which to distribute benefits. It is left to the discretion of the Authority to determine which mechanism or mechanisms will be appropriate for this purpose, bearing in mind that, as mentioned above, the establishment of a fund is an option.

V. Way forward and recommendations

17. In the light of the complexity and number of issues to be addressed for the development of equitable sharing criteria as broadly described in the previous section, a way forward may be to explore those issues in a more detailed study that would include suggested detailed criteria, in order to deepen the understanding of the issues at stake.

18. The Finance Committee is therefore invited:

(a) To take note of the present report;

(b) To request that the Secretary-General prepare a study with suggested sharing criteria for consideration at the twenty-fifth session of the Committee;

(c) To keep the present matter on its agenda for its session in 2019 and to make sufficient time available for discussion of the matter.